APPENDIX A.

Petition for Writ of Review Denied in re S. F. No. 18426, United Air Lines, Inc., petitioner, v. Public Utilities Commission of the State of California, respondent. August 2, 1951.

CALIFORNIA SUPREME COURT

APPENDIX B.

Decision No. 45624.

Before the Public Utilities Commission of the State of California.

Investigation into the fares, rules, regulations, charges, services, operations and practices of Arrow Airways, Inc.: California Central Airlines; Kenneth G. Friedkin, doing business as Pacific Southwest Airlines; Robin Airways, Inc.; Southwest Airways Company; Transcontinental & Western Air, Inc.; United Air Lines, Inc.; and Western Air Lines, Inc. Case No. 5271.

APPEARANCES

Ray E. Costello, for Southwest Airways Company, respondent,

Donald Keith Hall and D. P. Renda, for Western Air Lines, Inc., respondent,

Kenneth G. Friedkin, for Pacific Southwest Airlines, respondent,

John W. Preston, Jr., for California Central Airlines, respondent,

Charles Stearns, for United Air Lines, Inc., respondent.

David G. Shearer, for Trans World Airlines, Inc., respondent,

Norman D. Kessler, for Robin Airways, Inc., respondent,

Wilson E. Cline, C. H. Jacobsen and Thomas A. Hopkins, for the staff of the Public Utilities Commission of the State of California.

Opinion

This proceeding is an investigation upon the Commission's own motion into the reasonableness, lawfulness and propriety of the fares, rules, regulations, charges, services, operations and practices of respondent air lines for the transportation of passengers between the San Francisco Bay area and the Los Angeles area.

Public hearings were held before Commissioner Craemer and Examiner Bryant at Los Angeles on March 14 and 27, 1951. Briefs have been filed. The matter is ready for decision.

This investigation was instituted by the Commission upon receipt of information that fares were being assessed for so-called "coach" transportation in excess of those named for such service in the tariffs on file with the Commission. The eight air carriers maintaining published fares between the San Francisco and Los Angeles areas were made respondents.

Factual evidence was offered by representatives of various of the carriers and by members of the Commission's staff. The record shows that certain of the respondents are not offering the coach services with which this investigation is primarily concerned. Arrow Airways, Inc., is no longer operating common carrier service of any nature, and has requested that the tariff which it heretofore filed for California operations be cancelled.[1] Similarly, a member of the Commission's staff testified that the operations of Robin Airways have been suspended or discontinued. Southwest Airways Company and Trans World Airlines, Inc., (formerly Trans-

[1]Exhibit No. 6.

continental & Western Air, Inc.) have no coach operations between California points, and there is no evidence in this proceeding that either of these companies has made any unauthorized increase in fares or otherwise operated unlawfully or improperly. Kenneth G. Friedkin, doing business as Pacific Southwest Airlines, operates a coach service between the San Francisco and Los Angeles areas. The record shows that his fare for this service was maintained at $9.95 until March 28, 1951, on which date he increased it to $11.70, under authorization from this Commission.[2] The evidence is clear that Friedkin properly continued to assess and collect the lower fare until his tariff was lawfully amended. As to these three carriers the investigation may be discontinued upon cancellation of the inoperative tariffs.

The remaining respondents are California Central Airlines, United Air Lines, Inc. and Western Air Lines, Inc. As to these three carriers the essential facts are similar and undisputed. Each of them operates coach flights between the San Francisco and Los Angeles areas. For some time prior to March 1, 1951, California Central Airlines maintained for this service a one-way fare of $9.99 and the other two companies maintained a fare of $9.95. Effective with that date each of the companies started to collect and thereafter continued to collect a fare of $11.70. Each of the companies had filed with the Commission, prior to March 1, an application seeking authority to make the fare increase. None of the applications had been granted prior to March 1, nor have they yet been granted.[3]

---

[2]Authority No. 20-12-121 of March 20, 1951.

[3]It was these circumstances which impelled the institution of this proceeding.

At the conclusion of the taking of evidence the Commission's staff moved that the Commission promptly issue a preliminary order requiring the three respondents (1) to cease and desist charging passenger fares for air line coach travel in excess of the authorized fares set forth in their tariffs on file with the Commission, (2) to prepare and maintain a record of the names and addresses of all persons from whom more than the authorized fares have been or may be collected subsequent to February 28, 1951, and (3) to make reparation of the excess of the unauthorized fares over the authorized fares to all passengers whose names and addresses are reasonably ascertainable. Replies to the motion were, by agreement, incorporated in the briefs filed by the three respondents.

At the hearing and in their briefs the three carriers urged various extenuating circumstances. Primarily they challenged the Commission's power to regulate in any respect the activities and business of air transportation companies. They contended, and offered evidence to establish, that the fare increase was made in response to a request by the chairman of the Civil Aeronautics Board, which request the companies construed to be tantamount to a demand. They asserted that in any event the $11.70 fare is fully justified, and, without waiving their objection that the Commission lacks jurisdiction, introduced financial and other evidence designed to support the assertion.

The jurisdictional question may be considered first. The respondents argue on various grounds that the provisions of Article XII of the California Constitution are not applicable to air carriers, that the constitutional sections are not self-executing, and that the California legis-

lature has not made a specific grant of power to the Commission to regulate air carriers. United Air Lines, Inc., and Western Air Lines, Inc., assert further that the regulation of air commerce is a field which has been completely occupied by the Federal government under the Civil Aeronautics Act of 1938. United Air Lines, Inc., advance the additional argument that its operations in question are interstate in nature.

Article XII of the California Constitution contains many provisions which are pertinent to the jurisdictional question. Section 17 of said Article provides that, "All railroad, canal, and other transportation companies are declared to be common carriers, . . ." Section 23 of said Article, in part, states "every common carrier, is hereby declared to be a public utility . . ."

The staff on cross-examination of witnesses for the airlines developed the fact and we now find that the three air carriers, California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., which have increased their coach fares without Commission authorization offer their services to the public in general. Counsel for United Air Lines, Inc., in their brief admit that United is a common carrier.

In the recent case of *State ex rel. State Railway Commission v. Ramsey* (1949), 151 Nebr. 333, 27 N. W. (2d) 502, the Supreme Court of Nebraska in considering whether air carriers are common carriers as that term is used in the Nebraska Constitution laid down the following principles:

> ". . . A Constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community.

> The terms and provisions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men. While the powers granted thereby do not change, they do apply to all things to which they are in their nature applicable . . . These principles have been held to be applicable to transportation by air. . . . Common carriers by air are indistinguishable from other common carriers with respect to the policy of the law. Any person or organization engaged in transportation by air for hire is a common carrier." (p. 338 Nebr. Reports)

The California Supreme Court had under consideration in *Western Association of Short Line Railroads v. Railroad Commission* (1916), 173 Cal. 802, 162 Pac. 391, the question whether companies engaged in the then new businesses of transporting freight in motor trucks and passengers in automobile stages were "other transportation companies" referred to in Article XII of the California Constitution. The Court unequivocally held that they were public transportation companies, common carriers, and public utilities.

In light of the foregoing cited constitutional provisions and judicial decisions, we find and hold that the herein air carriers operating under coach fares between the Los Angeles area and the San Francisco Bay area are transportation companies, common carriers and public utilities.

We now turn to the question whether the Public Utilities Commission has jurisdiction over the air carriers with respect to increases in fares charged for transportation between points within the State of California.

Section 20 of Article XII of the California Constitution, in part, provides:

> "No railroad or other transportation company shall raise any rate of charge for the transportation of freight or passengers or any charge connected therewith or incidental thereto, under any circumstances whatsoever, except upon a showing before the railroad commission provided for in this Constitution, that such increase is justified. . . ."

Section 22 of Article XII of the California Constitution, in part, provides:

> "Said Commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said Commission than the rates, fares and charges which are specified in such tariff. . . ."

In the *Short Line Railroads* case, *supra*, the Supreme Court ordered that a peremptory writ of mandate issue requiring the Commission to assume the jurisdiction conferred by the above-quoted portion of Section 22. With reference to the absence of enabling legislation, the Court stated at page 804:

> "It is not and will not be questioned but that if the constitution has vested such power, it is not within the legislative power, either by its silence or

by direct enactment, to modify, curtail, or abridge this constitutional grant."

That decision is a clear statement that the provisions of said Section 22 of the constitution are self-executing, and that the Commission must exercise the authority therein conferred regardless of any absence of legislative enactments. While the Court did not refer to Section 20, there is no reason why the same construction would not be given that section.

Various of the respondents have referred to *In re Martinez* (1943), 22 Cal. (2d) 259, 138 P. (2d) 10, as being contrary to the principles above set forth. It is true that the *Martinez* case contains dictum to the effect that the Commission may exercise jurisdiction only where such jurisdiction is given by the legislature. However, in the *Martinez* case the Court had under consideration Section 23 of Article XII which reads, in part, as follows:

". . . The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. . . ."

The grant of jurisdiction to the Commission over intrastate rates of air carriers is found in Sections 20 and 22 of Article XII of the constitution. The provision quoted from Section 23 of said Article can claim no priority over

Sections 20 and 22 of said Article unless the former provision is more specific than the latter. As a matter of fact the latter are more specific than the former with respect to the regulation of rates of "other transportation companies." Should there be any possible ground for doubt on this point the provisions of Section 23 are conclusive against the contentions of respondents. Said Section 23 further provides, in part, as follows:

> ". . . Nothing in this section (Section 23 of Article XII) shall be construed as a limitation upon any power conferred upon the Railroad Commission by any provision of this Constitution now existing or adopted concurrently herewith."

In the face of these plain and unambiguous provisions of the constitution and in view of the holding in the *Short Line Railroads* case, *supra*, the dictum in the *Martinez* case cannot be considered as establishing a rule of law contrary thereto.

The Civil Aeronautics Act does not purport to extend economic regulation to intrastate transportation of persons or property other than mail. The states are therefore free to regulate intrastate rates and fares of air carriers to the same extent as they regulate intrastate rates and fares of railroads, trucking and bus companies, and telephone and telegraph utilities. (*Cooley v. Board of Port Wardens* (1851), 12 How. (U. S.) 299, 13 L. Ed. 996; *Minnesota Rates Cases* (1913), 230 U. S. 352, 57 L. Ed. 1511; *Eicholz v. Public Service Commission* (1939), 306 U. S. 268, 83 L. Ed. 641; *Smith v. Illinois Bell Telephone Co.* (1930), 282 U. S. 133, 75 L. Ed. 255; *Lindheimer v. Illinois Bell Telephone Co.* (1934), 292 U. S. 150, 78 L. Ed. 1182.)

Based upon the law and the facts we hold that the jurisdiction of the Commission in the premises is clear and that such jurisdiction should be exercised. The contention of respondents to the contrary we hold to be without merit.

A number of exhibits were submitted in justification of the reasonableness of the $11.70 fare. Among these was a 17-page inter-departmental memorandum of the Civil Aeronautics Board consisting essentially of estimates of revenues generated and expenses incurred by United Air Lines, Inc., and Western Air Lines, Inc., for air coach operations on the Pacific Coast. According to this memorandum, United incurred a loss of $73,461 in the San Francisco-Los Angeles operations for the period May through August, 1950, and Western similarly incurred a loss of $27,478 for the period June through August, 1950.[4] It was pointed out that the fare of $11.70 represents an increase of approximately one-half cent per passenger mile over the $9.95 fare, and that it results in a per-mile fare of about 3½ cents. According to the Civil Aeronautics Board, this contrasts with recently increased fares of 4½ cents per passenger mile now generally prevailing throughout the rest of the country for air coach services. The record in this proceeding is clear that the $11.70 fare was developed, recommended, and in fact urged upon the carriers, by that Board.

United Air Lines, Inc., through its traffic manager, introduced additional evidence concerning the operation of its coach flights between the San Francisco and Los Angeles areas. For its revenue and expense allocations, however, this company offered only the aforesaid analysis

[4]The estimated losses are on the basis of fully allocated costs.

made by the staff of the Civil Aeronautics Board. United did not submit comparable estimated results for the future. The following table shows actual operating experience at the $9.95 fare as developed by the Board's staff and submitted by the company. A second column shows, for comparative purposes, the results which would have obtained for the same period if the higher fare had applied and all other conditions were unchanged.

UNITED AIR LINES, INC.

(Four Months Ending with August, 1950)

	Actual Experience at $9.95 Fare	Adjusted Experience at $11.70 Fare
Revenues	$549,629	$549,629
Additional Revenue from Increased Fare	—	96,735[1]
Total Operating Revenues	$549,629	$646,364
Operating Expenses:		
Flying Operations	$121,884	
Direct Maintenance Flight Eqpt.	36,549	
Depreciation—Flight Eqpt.	63,378	
Ground & Direct Maintenance	38,160	
Ground Operations	90,083	
Stewardesses' Salaries & Expense	8,054	
Passenger Insurance & Supplies	9,847	
Traffic and Sales	90,529	
Advertising and Publicity	11,703	
General and Administrative	47,881	
Depreciation—Ground Eqpt.	16,925	
General Headquarters Expense	88,097	
Total Operating Expense	$623,090	$623,090[2]
Net Operating Profit[3]	$(73,461)	23,274
Operating Ratio[3]	113.4%	96.4%

(_____) Denotes Loss

[1]Revenue resulting from a 17.6 per cent increase in fares.

[2]Carrier did not submit 1951 estimated expenses.

[3]Before federal income taxes.

The director of budgetary controls of Western Air Lines, Inc., introduced and explained an exhibit showing month-by-month results of coach operations between the San Francisco and Los Angeles areas for the nine months from June, 1950, through February, 1951. The increase in passenger revenues, assuming a fare of $11.70 instead of $9.95, was included, but this company, like United, did not submit estimated revenues or expenses for the future. The actual and adjusted figures for Western Air Lines, Inc., are shown in the table which follows:

WESTERN AIR LINES, INC.

(Nine Months Ending With February, 1951)

	Actual[1] Experience at $9.95 Fare	Adjusted Experience at $11.70 Fare
Revenues	$1,063,527	$1,063,527
Additional revenue from increased fare		184,793[2]
Total Operating Revenue	$1,063,527	$1,248,320
Operating Expenses:		
Flight Operations	$ 263,881	
Direct Maintenance	94,114	
Depreciation of Flight Eqpt.	126,000	
Indirect & Ground Expense	683,770	
Total Operating Expenses	$1,167,765	$1,167,765[3]
Net Operating Profit[4]	(104,238)	$ 80,555
Operating Ratio[4]	109.8%	93.6%

( ) Denotes Loss

[1]February costs based on January experience prorated for 28 days.

[2]Additional revenue resulting from the increased fare as estimated by the witness.

[3]Carrier did not submit 1951 estimated expenses.

[4]Before federal income tax.

California Central Airlines, which operates wholly within the State of California, derives approximately 90

per cent of its revenue from coach flights between the San Francisco and Los Angeles areas. The operations of this company were not included in the staff report of the Civil Aeronautics Board. Exhibits submitted by the company show revenues, expenses, and estimated costs, as well as various plane-mile and passenger-mile data. According to the evidence, the company earned in the year 1950 a net profit of $1,512; and, if the higher fare and certain increased expenses had been in effect during the year, would have received an estimated net profit of $20,104. The operating ratios would be 99.8 per cent and 98.0 per cent, respectively. The figures as submitted by this company are summarized in the following table:

CALIFORNIA CENTRAL AIRLINES

(Twelve-Month Period)

	Year 1950 Actual Experience at $9.99 Fare	Year 1951 Estimated Experience at $11.70 Fare
Operating Revenues	$855,145	$981,371[1]
Operating Expenses:		
Flying Operations	$605,290	
Ground Operations	31,508	
Ground & Indirect Maintenance	8,995	
Passenger Service	15,600	
Traffic and Sales	114,806	
Advertising & Publicity	31,537	
General & Administrative	44,564	
Depreciation—Ground Property	1,333	
Total Operating Expenses	$853,633	$961,267[2]
Net Operating Revenues[3]	$ 1,512	$ 20,104
Operating Ratio[3]	99.8%	98.0%

[1]Revenue resulting from the 17.1 per cent increase in fares and an estimated diminution of five per cent in the number of passengers carried.

[2]The estimated expenses for 1951 were not segregated by accounts.

[3]Before federal income tax.

None of the companies supplied all of the supporting or underlying data which would be desirable. Nevertheless, considering all of the circumstances of record, the evidence is convincing, and we find as a fact, that the higher fare is justified. Publication, filing and maintenance of the fare will be authorized.

It is entirely clear, however, and indeed it is not disputed, that California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., increased their fares without first receiving authorization from this Commission. Timely requests for authority to make the increase were filed, but the showings required by the state constitution were made belatedly, and were incomplete at the time the instant investigatory proceeding was instituted and notice thereof served upon the respondents. The order which follows will authorize publication and maintenance of the $11.70 fare for the future. These companies are hereby placed on notice that they are and will hereafter be deemed to be "transportation companies" within the meaning of the Constitution of the State of California, and that they are subject to the prohibitions and requirements of said constitution. We also call the attention of these companies to Section 76(a) of the Public Utilities Act, which provides:

> "Any public utility which violates or fails to comply with any provision of the constitution of this state or of this act, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such public utility, is subject to a penalty

of not less than five hundred dollars nor more than two thousand dollars for each and every offense."

In view of the fact that these air carriers since March 1, 1951, have been charging fares in excess of the fares reflected by their tariffs on file with this Commission as applied to coach operations between the San Francisco Bay area airports and the Los Angeles area airports, we are of the opinion that amounts collected in excess of such tariff fares should be refunded, wherever possible, to passengers who have paid the same and such direction will be incorporated in the order following this opinion. Sections 20, 21 and 22 of Article XII of the State Constitution require that such reparation be made.

There is some evidence, not hereinbefore discussed, relative to possible failure of some of the respondents to comply strictly with their filed tariff rules governing refunds or exchanges of unused tickets. This subject was subordinate to the basic issues in this proceeding, and the evidence thereon was in any event inconclusive. On this subject we make no finding of fact.

Order

Public hearings having been had in the above-entitled proceeding, evidence having been received and duly considered, the Commission now being advised and basing its order upon the findings and conclusions set forth in the preceding opinion,

It Is Hereby Ordered:

1. That California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., be and they are hereby authorized to publish, file and maintain a one-way adult coach fare of $11.70 for transportation of passengers be-

tween San Francisco Bay area airports on the one hand and Los Angeles area airports on the other hand.

2. That California Central Air Lines, United Air Lines, Inc., and Western Air Lines, Inc., be and they are hereby ordered to make reparation, wherever possible, to passengers paying coach fares for transportation between the San Francisco Bay area airports on the one hand the the Los Angeles area airports on the other hand, in excess of the fares as reflected by the tariffs of these air carriers on file with this Commission.

3. That California Central Airlines, United Air Lines, Inc., and Western Air Lines, Inc., and all other of the respondents operating as common carriers, be and they are hereby adjured and admonished that they may not, for the transportation of passengers and property in intrastate commerce between points within the State of California, raise any rate of charge under any circumstances whatsoever except upon a showing before the Commission that such increase is justified, make unreasonable charges, discriminate in charges or facilities, nor in any other manner violate any of the provisions of Article XII of the Constitution of the State of California applicable to transportation companies.

4. That tariffs heretofore filed with this Commission by Arrow Airways, Inc., and Robin Airways, Inc., naming fares, rules and regulations governing transportation of passengers between points in this state, be and they are hereby canceled.

5. That the several pending motions for dismissal of the proceeding as to particular respondents, and the pending motion for issuance of a "preliminary order," be and they are hereby denied.

6. That, upon the effective date of this order, this investigation be and it is hereby discontinued.

The Secretary is hereby directed to cause a certified copy of this decision forthwith to be served personally on Arrow Airways, Inc., California Central Airlines, Kenneth G. Friedkin, doing business as Pacific Southwest Airlines, Robin Airways, Inc., Southwest Airways Company, Transworld Airlines, United Air Lines, Inc., and Western Air Lines, Inc.

The effective date of this decision shall be fifteen (15) days after the date hereof.

Dated at San Francisco, California, this 24th day of April, 1951.

R. E. MITTELSTAEDT,
JUSTUS F. CRAEMER,
HAROLD P. HULS,
KENNETH POTTER,
PETER E. MITCHELL,
Commissioners.

DEC 5 1951

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1951

No. 464

UNITED AIR LINES, INC,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EVERETT C. MCKEAGE,
Chief Counsel,
WILSON E. CLINE,
Associate Counsel,
Counsel for Public Utilities Commission of the State of California.

INDEX

Subject Index

	Page
I. Statement of the facts	1
II. Statement of the issues on appeal	5
III. No substantial Federal question is presented by the attempted appeal	7
A. Preliminary statement	7
B. The order of the Commission regulating the intrastate fares charged intrastate passengers by air carriers engaged both in intrastate and interstate commerce for transportation between points in California does not place such a burden on interstate commerce as to constitute a violation of the Interstate Commerce Clause of the Constitution of the United States (Subsection 3 of Section 8, Article I)	9
C. The Congress through the Civil Aeronautics Act of 1938, as Amended (52 Stats. 977, 49 U. S. Code 401 et seq.) has not pre-empted the field of economic regulation of air carriers engaged in interstate commerce, or in the transportation of U. S. mail, or both, so as to preclude the Commission from regulating the intrastate fares charged intrastate passengers by such carriers for transportation between points in California	12
D. United can comply with the Reparation Order of the Commission without violating the provisions of Section 403(b) of the Civil Aeronautics Act (49 U.S. Code 483(b))	17

Page

E. The Commission's order requiring air carriers engaged both in intrastate and interstate commerce to make reparation to passengers paying intrastate fares for transportation between points in California in excess of the intrastate fares included in their authorized tariffs on file with the Commission does not deprive such carrier of property without due process of law 17

IV. Conclusion and motion to dismiss or affirm 18

Table of Cases Cited

Alabama Public Service Commission v. *Southern Railway Company* (1951), 341 U. S. (Preliminary Print) 341, 95 L. ed. Adv. Ops. 708 10

Arkansas Railroad Commission v. *Chicago R. I. & P. Co.* (1927), 274 U. S. 597, 71 L. ed. 1224 12

California Central Airlines, et al. (Decision No. 43932, 1950), 49 Cal. P.U.C. 494 ..... 2, 8

California Central Airlines, et al. (Decision No. 45624, 1951), 50 Cal. P.U.C. 563 4

Cooley v. *Board of Port Wardens* (1851), 12 How. (U. S.) 299, 13 L. ed. 996 10

Davies Warehouse Co. v. *Bowles* (1944), 321 U. S. 144, 88 L. ed. 635 16

Eicholz v. *Public Service Commission* (1939), 306 U. S. 268, 83 L. ed. 641 10

Kelly v. *Washington* (1937), 302 U. S. 1, 82 L. ed. 3 11

Lindheimer v. *Illinois Bell Telephone Co.* (1934), 292 U. S. 151, 78 L. ed. 1182 10

Minnesota Rate Cases (1913), 230 U. S. 352, 57 L. ed. 1511 10

North Carolina v. *United States* (1945), 325 U. S. 507, 89 L. ed. 1760 11

Palmer v. *Massachusetts* (1939), 308 U. S. 79, 84 L. ed. 93 11

Page

Panhandle Eastern Pipe Line Co. v. *Michigan Public Service Commission* (1951), 341 U. S. (Preliminary Print) 329, 95 L. ed. Adv. Ops. 673 11
Rosenhan v. *United States* (1942), 131 F. (2d) 932, cert. den., 318 U. S. 790, 87 L. ed. 1156 13
Smith v. *Illinois Bell Telephone Co.* (1930), 282 U. S. 133, 75 L. ed. 255 10

STATUTES

California Constitution:

Article XII 2, 8

Civil Aeronautics Act (52 Stat. 977, 49 U. S. Code 401, et seq.) 6

Section 1(2), 49 U.S. Code 401 (2) 12
Section 1(3), 49 U. S. Code 401 (3) 13
Section 1(10), 49 U. S. Code 401 (10) 12
Section 401, 49 U. S. Code 481 12
Section 403, 49 U. S. Code 483 12
Section 403(b), 49 U. S. Code 483(b) 17
Section 404, 49 U. S. Code 484 12
Section 406(b), 49 U. S. Code 486(b) 13
Section 601, 49 U. S. Code 551 13

Constitution of the United States:

Article I, Section 8, Subsection 3 7
14th Amendment, Section 1 18

Interstate Commerce Act:

49 U. S. Code 1, et seq. 10

Rules on Appeal for the Supreme Court (1951), 6 Cal. (2d) 1:

Rule 27 5
Rule 53 5

BILLS, PROCEEDINGS AND LAW REVIEW ARTICLE

	Page
Aviation Bills, 78th Congress:	
Lea Bill, H.R. 1012	14
Revised Lea Bill, H.R. 3420	14
H.R. Report No. 784 on H.R. 3420, H.R. Committee on Interstate and Foreign Commerce	15
Boren Bill, H.R. 4845	14
Reece Bill, H.R. 4848	14
Bailey Bill, S. 246	14
79th Congress:	
Lea Bill, H.R. 674	14
Lea Bill, H.R. 3383	14
Johnson Bill, S. 541	14
80th Congress:	
Wolverton Bill, H.R. 2337	14
81st Congress:	
Brewster Bill, S. 423	14
Johnson Bill, S. 445	14
Johnson Bill, S. 2435	14
National Association of Railroad and Utilities Commissioners Proceedings:	
1944 N.A.R.U.C. Proceedings 221	14
1945 N.A.R.U.C. Proceedings 299	14
1946 N.A.R.U.C. Proceedings 210	14
1947 N.A.R.U.C. Proceedings 128	14
1948 N.A.R.U.C. Proceedings 69	14
1949 N.A.R.U.C. Proceedings 166	14
1950 N.A.R.U.C. Proceedings 106	14
Hamley, Appropriate Areas of State Economic Regulation (1946), 11 Law and Contemporary Problems, 488	15

SUPREME COURT OF THE STATE OF CALIFORNIA

UNITED AIR LINES, INC,

Petitioner-Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent-Appellee

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The Public Utilities Commission of the State of California, respondent and appellee (hereinafter referred to as Commission), for its statement in opposition to statement as to jurisdiction herein of United Air Lines, Inc., petitioner and appellant (hereinafter referred to as United), and in support of said Commission's motion to dismiss or affirm, respectfully shows the following:

I. Statement of the Facts

United is regularly engaged as a common carrier in the business of carrying passengers by air. Among others its operations include both standard and coach-class flights between the Los Angeles area airports and the San Francisco Bay area airports and vice versa. On its coach-class flights between these airports United carries passengers whose journeys are wholly within the State of California and pas-

sengers whose flights are only segments of interstate journeys. On these air coach flights United carries U. S. mail.

United has had tariffs covering its intrastate operations continuously on file with the Commission since November 28, 1931. The fares under consideration in this appeal are the one-way adult fares for coach-class passenger air service between Los Angeles area airports and the San Francisco Bay area airports.

These same fares were the subject of investigatory proceedings instituted on the Commission's own motion against various air carriers in 1949. In Decision No. 43932 (March 14, 1950), 49 Cal. P.U.C. 494, issuing out of this proceeding, the Commission found that it had authority to institute such proceedings under Article XII of the California Constitution and pursuant to such authority the Commission found that the one-way fares of $9.95 and $9.99 then being charged had been shown to be reasonable. As United at that time was not engaged in air coach operations between the Los Angeles area airports and the San Francisco Bay area airports it was not made a party to this proceeding.

United later became engaged in air coach operations between these airports and filed an intrastate adult one-way tariff of $9.95 with the Commission. Subsequently United made application to the Commission, by letter dated February 9, 1951, to increase its intrastate one-way adult coach fares between Los Angeles and Oakland/San Francisco from $9.95 to $11.70 to be effective March 1, 1951.

Previously, on February 7, 1951, Western Air Lines, Inc., (hereinafter referred to as Western), had made a similar application with the Commission, and shortly thereafter but before March 1, 1951, Pacific Southwest Airlines and California Central Airlines, the only other air carriers operating under coach-class fares between the Los Angeles area and the San Francisco Bay area, mailed applications

to the Commission requesting authority to increase their intrastate one-way adult coach-class fares to $11.70 on March 1, 1951.

The evidence subsequently introduced at the Commission hearings showed that all these applications for fare increases had been filed pursuant to request by the Civil Aeronautics Board that these air carriers increase their coach-class fares between the Los Angeles area and the San Francisco Bay area to $11.70 effective March 1, 1951. That the Civil Aeronautics Board intended these requests to apply to intrastate fares is made clear by the fact that they were directed to Pacific Southwest Airlines and California Central Airlines, both of which are non-certificated air carriers engaged solely in intrastate operations wholly within the State of California, as well as to Western and United.

As the information submitted in support of the various applications filed with the Commission was not sufficient to warrant the ex parte authorization of the requested increases, the tendered tariff pages were rejected. Nevertheless, on March 1, 1951, California Central Airlines, Western and United proceeded to increase their fares to $11.70 without Commission authorization. As a result on March 6, 1951, the Commission issued its order of investigation.

Hearings were held in Los Angeles on March 10 and March 27, 1951. At the outset and throughout the course of the hearings, California Central Airlines, Western and United made clear their contention that the Commission had no jurisdiction over their fares, Western and United both claiming lack of jurisdiction by reason of the Federal Constitution as well as the California Constitution. However, at the March 27, 1951 hearing all three did submit evidence in justification of the intrastate coach-class fare increases and sought Commission approval of the applications which previously had been filed.

On March 19, 1951, Pacific Southwest Airlines refiled its application, this time with sufficient supporting data to enable the Commission to act favorably thereon. On March 20, 1951, the Commission *ex parte* authorized Pacific Southwest Airlines to increase its coach fares, and pursuant to such authorization its coach-class fares for the first time were increased to $11.70 effective March 28, 1951.

The Commission issued its Decision No. 45624, 50 Cal. P.U.C. 563, April 24, 1951, a copy of which decision appears as Appendix B attached to United's Jurisdictional Statement. The order therein authorized California Central Airlines, Western and United to increase their intrastate one-way adult coach-class fares for transportation of passengers between the San Francisco Bay area airports and the Los Angeles area airports to $11.70 and directed these three carriers to make reparation, wherever possible, to passengers paying coach fares between said airports in excess of the authorized fares. The effective date of the order was May 9, 1951. Central California Airlines, Western and United filed timely petitions for rehearing with the Commission, all of which petitions were denied by the Commission by decisions dated May 15, 1951.

In the meantime, on May 4, 1951, United, pursuant to Commission Decision No. 45624, *supra*, filed its revised tariff covering intrastate air coach-class fares between the Los Angeles area airports and the San Francisco Bay area airports, effective May 10, 1951. Likewise Western and California Central Airlines filed revised tariffs covering such fares.

California Central Airlines upon denial of its petition for rehearing acquiesced in the order of the Commission and indicated it would proceed with reparation wherever possible.

June 14, 1951, Western and United filed petitions for writs of review of the Commission Decision No. 45624,

supra, with the California Supreme Court, S.F. No. 18427 and S.F. No. 18426, respectively. Both petitions were denied by the California Supreme Court by orders issued without opinion, filed August 2, 1951. On August 16, 1951, Western filed with the California Supreme Court a petition for rehearing of the order denying the writ of review, and on August 30, 1951, the California Supreme Court denied this petition for rehearing by order again without opinion.

United has stated on page 6 of its Jurisdictional Statement that it filed no petition for rehearing because no procedure is provided under the laws of the State of California for filing a petition for rehearing of an order of the California Supreme Court denying a petition for writ to review a Commission order. However, Rules 27 and 53 of Rules on Appeal for the Supreme Court (California), adopted by the Judicial Council, as amended to January 1, 1951, 36 Cal. (2d) 1, do provide for the filing of a petition for rehearing of such a California Supreme Court decision.

On October 26, 1951, both Western and United filed appeals from the orders of the California Supreme Court with the United States Supreme Court. If hearings be granted on these appeals this Commission will in due time move that the United States Supreme Court consolidate these appeals for hearing.

II. Statement of the Issues on Appeal

The basic issues raised by United on its appeal to the United States Supreme Court appear in italics on pages 17 and 18 of its Jurisdictional Statement as follows:

(1) "The United States Has Assumed Exclusive Control of the Rates of Air Carriers."

(2) "Respondent's Order Unlawfully Interferes With Interstate Commerce."

(3) "Respondent Seeks to Deprive Petitioner of Property Without Due Process."

Issue (1) above is too broad in its scope. In considering the issue as stated by United, the Court would have to determine whether the Civil Aeronautics Act precludes the Commission from regulating the intrastate fares charged intrastate passengers by a non-certificated carrier engaged in commercial air transportation wholly within the State of California and carrying only intrastate passengers. Admittedly, United is not such an air carrier, and, as previously stated, California Central Airlines, the only such air carrier whose fares are regulated by the Commission order here under consideration, has acquiesced in its validity.

The Commission wishes the Court clearly to understand that the Commission does not seek to exercise any jurisdiction over interstate fares. The specific fare under consideration is an intrastate fare inasmuch as the $11.70 is for travel between airports within the State of California. However, this intrastate fare may be charged an interstate passenger (*i.e.*, one whose travel between the Los Angeles area airports and the San Francisco Bay area airports is only a segment of an interstate journey), as an integral part of an interstate fare, or it may be charged an intrastate passenger (*i.e.*, one whose entire journey is within the State of California). The Commission takes the position that its order, as set forth in Decision No. 45624, *supra*, pertains only and could pertain only to fares which are being charged to those passengers whose journeys between the Los Angeles area airports and the San Francisco Bay area airports are intrastate journeys and not integral parts of interstate journeys. Such fares are hereinafter referred to as intrastate fares.

We believe the following questions to be more definitive of the issues before the Court in this appeal:

(1) Has the Congress, through the Civil Aeronautics Act of 1938, as amended (52 Stats. 977, 49 U.S. Code 401, *et*

seq.), pre-empted the field of economic regulation of air carriers engaged in interstate commerce, or in the transportation of U.S. mail, or both, so as to preclude the Commission from regulating the intrastate fares charged intrastate passengers by such carriers for transportation between points in California?

(2) Does the order of the Commission regulating the intrastate fares charged intrastate passengers by air carriers engaged both in intrastate and interstate commerce for transportation between points in California place such a burden on interstate commerce as to constitute a violation of the Interstate Commerce Clause of the Constitution of the United States (Subsection 3 of Section 8, Article I).

(3) Does the Commission's order requiring air carriers engaged both in intrastate and interstate commerce to make reparation to passengers paying intrastate fares for transportation between points in California in excess of the intrastate fares included in their authorized tariffs on file with the Commission deprive such carriers of property without due process of law?

III. No Substantial Federal Question Is Presented by the Attempted Appeal

Although the United States Supreme Court has not issued a decision specifically answering the above stated questions with respect to air carriers, this Court has considered substantially the same questions in cases involving other types of carriers and utilities and has clearly determined such issues in favor of the validity of the Commission's order. We propose to demonstrate that United has raised no substantial Federal question by its attempted appeal.

A. *Preliminary Statement*

With respect to the general question of Commission jurisdiction over rates of air carriers, it is interesting to

note that United has, since November 28, 1931, submitted to this jurisdiction by having on file with the Commission, either in its own name or that of a subsidiary or affiliate, tariffs of its intrastate fares. Western has had tariffs of its intrastate fares on file with the Commission since June 21, 1945. Both Western and its subsidiary, Western Air Lines of California, Inc., acquiesced in Commission Decision No. 43932, 49 Cal. P.U.C. 494, which found that the Commission had authority under Article XII of the California Constitution to institute proceedings to determine the reasonableness of intrastate fares of air carriers and, pursuant to such authority, found that the one-way fares of $9.95 and $9.99 being assessed for airline coach-class service between Los Angeles and San Francisco had been shown to be reasonable.

The inconsistent positions taken by the petitioners are further clearly demonstrated by the fact that both Western and United filed applications with the Commission seeking approval of the $11.70 fare as an intrastate fare, and both petitioners, pursuant to Commission Decision No. 45624, which is here under attack, have filed tariffs with the Commission setting forth the $11.70 one-way adult fare for air-coach service between the Los Angeles area airports and the San Francisco Bay area airports.

Western and United are willing to take the benefit of Commission authorization of the increased fares but deny that the Commission has jurisdiction to exercise such authority. It is a rule of law that one may not approbate and reprobate at the same time, particularly where he accepts the benefit of the approbation. The actions of United and Western prove a clear recognition on their part (although they seek to deny it) of the lawful authority of the Commission to regulate their intrastate fares.

The Interstate Commerce Clause of the Constitution of the United States became effective in 1789, the Civil Aero-

nautics Act in 1938. For logical as well as historical reasons we prefer to discuss the issues outlined above in different order.

B. *The Order of the Commission Regulating the Intrastate Fares Charged Intrastate Passengers by Air Carriers Engaged Both in Intrastate and Interstate Commerce for Transportation Between Points in California Does Not Place Such a Burden on Interstate Commerce as to Constitute a violation of the Interstate Commerce Clause of the Constitution of the United States (Subsection 3 of Section 8, Article I).*

The fact that United is engaged in interstate as well as intrastate commerce has no significance so far as the validity of the order of the Commission is concerned. The regulation of fares charged by air carriers requires no more uniformity than does the regulation of fares and rates of railroads, bus lines, truck lines, and telephone and telegraph utilities.

The speed of an airplane loses its significance when compared to the speed of transmittal of a telephone or telegraph message. It is a matter of common knowledge that the separation of interstate and intrastate operations of telephone and telegraph utilities is much more difficult than the separation of the interstate and intrastate operations of passenger and freight carriers, including air carriers. However, such facts have not resulted in exclusion of state regulation of charges for intrastate telephone and telegraph messages.

It has long been held by the United States Supreme Court that until such time as the Congress pre-empts the entire field of regulation, both interstate and intrastate, common carriers and utilities are subject to state regulation in so far as intrastate operations are concerned, even though

their interstate operations are regulated by Federal authority.

Cooley v. *Board of Port Wardens* (1851), 12 How. (U. S.) 299, 13 L. ed. 996.

Minnesota Rate Cases (1913), 230 U. S. 352, 57 L. ed. 1511.

Eicholz v. *Public Service Commission* (1939), 306 U. S. 268, 83 L. ed. 641.

Smith v. *Illinois Bell Telephone Co.* (1930), 282 U. S. 133, 75 L. ed. 255.

Lindheimer v. *Illinois Bell Telephone Co.* (1934), 292 U. S. 151, 78 L. ed. 1182.

In the recent case of *Alabama Public Service Commission* v. *Southern Railway Company* (1951), 341 U. S. (Preliminary Print) 341, 345, 95 L. ed. Adv. Ops. 708, 711, the United States Supreme Court, speaking through Mr. Chief Justice Vinson, made the following statement regarding state regulation of intrastate transportation:

> "Appellee conducts an interstate business over the same tracks and by means of the same trains involved in this case, and such interstate activities are regulated by the Federal Interstate Commerce Commission, 49 U. S. C. §§ 1, et seq. But, it has long been held that this interblending of the interstate and intrastate operations does not deprive the states of their primary authority over intrastate transportation in the absence of congressional action supplementing that authority. • • • And Congress has since provided:
>
> " 'That nothing in [the Interstate Commerce Act] shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the [Interstate Commerce Commission].' 49 U. S. C. § 1 (17(a)).

> "This Court has held that regulation of intrastate railroad service is 'primarily the concern of the state.' *North Carolina* v. *United States*, 325 U. S. 507, 511, 89 L. ed. 1760, 1765, 65 S. Ct. 1260 (1945) (rates); *Palmer* v. *Massachusetts*, 308 U. S. 79, 84 L. ed. 93, 60 S. Ct. 34 (1939) (discontinuance of local service)."

The United States Supreme Court has held that the states may even regulate *interstate* commerce of a local nature until such time as the Congress has pre-empted the entire field of interstate commerce.

Kelly v. *Washington* (1937), 302 U. S. 1, 9-15, 82 L. ed. 3, 10-13.

Panhandle Eastern Pipe Line Co. v. *Michigan Public Service Commission* (1951), 341 U. S. (Preliminary Print) 329, 333, 95 L. ed. Adv. Ops. 673, 676.

The United States Supreme Court, in upholding state regulation of direct sales of gas for consumptive use by a natural gas company which was engaged in interstate commerce, through the majority opinion delivered by Mr. Justice Minton, in the case of *Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission* (1951), 341 U. S. (Preliminary Print), 329, 333, 95 L. ed. Adv. Ops. 673, 676, went even further to state:

> " * * * In the absence of federal regulation, state regulation is required in the public interest. * * *"

C. The Congress Through the Civil Aeronautics Act, as Amended (52 Stats. 977, 49 U. S. Code 401 et seq.) Has Not Pre-empted the Field of Economic Regulation of Air Carriers Engaged in Interstate Commerce, or in the Transportation of U. S. Mail, or Both, so as to Preclude the Commission from Regulating the Intrastate Fares Charged Intrastate Passengers by Such Carriers for Transportation Between Points in California.

Section 1(2) of the Civil Aeronautics Act (49 U. S. Code 401(2)) defines "air carrier" as one engaged in "air transportation," and "air transportation" is defined in Section 1(10) (49 U. S. Code 401(10)) to mean "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."

Air carrier economic regulation under Sections 401, 403, and 404 of the Civil Aeronautics Act (49 U. S. Code 481, 483, and 484) is limited to the regulation of "air transportation." The rates, fares, and charges regulated by the Civil Aeronautics Board under these sections are "rates, fares, and charges for air transportation."

There is nothing in the Civil Aeronautics Act which gives the Civil Aeronautics Board jurisdiction over intrastate fares charged intrastate passengers by "air carriers", nor is there anything in the Act which prevents the states from exercising jurisdiction over such fares.

Even though the provisions of the Civil Aeronautics Act were not clear in this regard, the United States Supreme Court has held that any doubt should be resolved in favor of state power. We quote from the majority opinion of Mr. Justice Brandeis in *Arkansas Railroad Commission* v. *Chicago, R. I. & P. Co.* (1927), 274 U. S. 597, 603, 71 L. Ed. 1224, 1228:

> "The intention to interfere with the state function of regulating intrastate rates is not to be presumed.

> Where there is a serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the state power. * * *"

Although Section 406(b) of the Civil Aeronautics Act (49 U. S. Code 486) permits the Civil Aeronautics Board in fixing reasonable rates for the transportation of mail by air to consider the need of the air carrier and its revenue from other sources, such section does not preclude state regulation of intrastate passenger fares. The California Public Utilities Commission is as duty bound to fix just and reasonable intrastate fares as is the Civil Aeronautics Board duty bound to fix just and reasonable interstate fares. There are adequate administrative and judicial remedies should either governmental regulatory agency become remiss in its duty.

Rosenhan v. *United States* (1942), 131 F. (2d) 932, cert. den. 318 U. S. 790, 87 L. Ed. 1156, is sometimes cited as case authority to show that the Federal government has pre-empted the entire field of air carrier regulation. The case relates only to the safety regulatory provisions of the Civil Aeronautics Act, however.

Federal regulation of the safety phase of the operations of air carriers is pursuant to Section 601 of the Civil Aeronautics Act (49 U. S. Code 551) which grants the Civil Aeronautics Board authority over "air commerce." Section 1(3) of the Act (49 U. S. Code 401(3)) defines "commerce" to mean "interstate, overseas, or foreign air commerce or transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign commerce."

A review of the definition of "air commerce" and the safety provisions of the Civil Aeronautics Act clearly

demonstrates that the Congress knows how to use language to extend Federal regulation to intrastate activities when it desires to do so.

The Congress has consistently refused to occupy the entire field of regulation of air carriers, although the Civil Aeronautics Board and the interstate air carriers on numerous occasions have strenuously attempted to destroy state regulation of air carriers by prevailing upon the Congress to supersede state authority.

In this connection we refer this Court to the legislative history of the following bills, none of which has been enacted:

78th Congress: Lea-Bailey Aviation Bill introduced as H. R. 1012 and S. 246; revised form of Lea-Bailey Aviation Bill, H. R. 3420; Boren Bill, H. R. 4845; Reece Bill, H. R. 4848.

79th Congress: Lea Bill, H. R. 674; Johnson Bill S. 541; Lea Bill, H. R. 3383.

80th Congress: Wolverton Bill, H. R. 2337.

81st Congress: Brewster Bill, S. 423; Johnson Bill, S. 445; Johnson Bill, S. 2435.

A concise discussion of these bills and the opposition they met in the Congressional Committees will be found in the following reports of the proceedings of the National Association of Railroad and Utilities Commissioners:

1944	N. A. R. U. C.	Proceedings	221
1945	"	"	299
1946	"	"	210
1947	"	"	128
1948	"	"	69
1949	"	"	166
1950	"	"	106

For a strong statement in support of the desirability of exclusive Federal regulation of all air navigation and air commerce we refer United to the paragraphs appearing under the heading "Federal Jurisdiction" commencing on page 8 of H. R. Report No. 784, on the Civil Aviation Bill, 78th Congress—H. R. 3420, submitted by Mr. Bulwinkle, from the House of Representatives Committee on Interstate and Foreign Commerce. This statement commences and reads in part as follows:

> "The inherent nature of aviation requires Federal regulation of all air navigation and air commerce. Such regulation is provided for in the bill."

We also quote from the Minority Views of same report at page 41:

> "The signers of these minority views do not agree with H. R. 3420, as reported by the committee, because (1) it destroys States' rights, • • •
>
> "(b) The committee bill (by specific provisions hereinafter set forth) *takes away* [emphasis added] all rights of the States:
>
> "(1) *To regulate intrastate commerce by air*, including certificates, permits, rates, and all other matters normally subject to the State regulation of intrastate operations of public utilities."

As previously stated the minority views prevailed and the Congress did not take away the rights of the States. H. R. 3420 was never enacted into law.

"Appropriate Areas of State Economic Regulation" by Frederick G. Hamley (1946), 11 Law and Contemporary Problems 488, is an excellent article setting forth views in support of the continuance of state regulation of air carriers.

By seeking to have the United States Supreme Court, by judicial decision, preclude the states from regulating

the intrastate fares of air carriers United presents a bold attack upon our Federal form of government. This Court, however, has consistently held that it will not construe an act of the Congress as superseding State authority and jurisdiction unless the statute be clear and unequivocal on the point. Mr. Justice Jackson, speaking for the Supreme Court of the United States, clearly reiterated these principles in the case of *Davies Warehouse Co.* v. *Bowles* (1944), 321 U. S. 144, 153-155, 88 L. Ed. 635, 642-643:

> "Simplicity of administration is a merit that does not inhere in a federal system of government, as it is claimed to do in a unitary one. A federal system makes a merit, instead, of the very local autonomy in which complexities are inherent.
>
> • • • • • • •
>
> "At a time when great measures of concentration of direction are concededly necessary, it may be thought more farsighted to avoid paralyzing or extinguishing local institutions which do not seriously conflict with the central government's place. Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not. * * *
>
> "At least in the absence of congressional mandate to that effect, we cannot adopt a rule of construction, otherwise unjustified, to relieve federal administrators of what we may well believe is a substantial burden but one implied by the terms of the legislation when viewed against the background of our form of government."

D. *United Can Comply With the Reparation Order of the Commission Without Violating the Provisions of Section 403(b) of the Civil Aeronautics Act (49 U. S. Code 483(b)).*

Section 403(b) of the Civil Aeronautics Act (49 U. S. Code 483(b)) in part provides:

> "(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; * * *."

This Court will note that the terms used therein are "air carrier" and "air transportation" as defined in the Act and not "air commerce." Hence the section applies to interstate and not to intrastate fares. Concededly the order of the Commission applies only to intrastate fares.

Even though United does find itself in a dilemma, it has no right to complain, as its own voluntary actions have created the situation. Air carriers, like other common carriers, advisedly should obtain all the necessary authorizations from the proper regulatory bodies, both State and Federal, before placing into effect an increase in fares.

E. *The Commission's Order Requiring Air Carriers Engaged Both in Intrastate and Interstate Commerce to Make Reparation to Passengers Paying Intrastate Fares for Transportation Between Points in California in Excess of the Intrastate Fares Included in Their Authorized Tariffs on File with the Commission Does Not Deprive Such Carrier of Property Without Due Process of Law.*

As the preceding sections of this Statement in Opposition to Appellant's Statement of Jurisdiction clearly demon-

strate that the Commission does have jurisdiction over the intrastate fares charged by air carriers for transportation between points in California, the Commission's order herein under attack, requiring United to make reparation, does not unconstitutionally deprive United of its property without due process of law, in violation of the 14th Amendment, Section 1, of the Constitution of the United States of America.

IV. Conclusion and Motion to Dismiss or Affirm

We respectfully submit that the questions presented in this appeal have long ago been so definitely determined that no substantial questions are presented by this appeal entitling United to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE appellee and respondent respectfully moves that the within appeal be dismissed or that the orders of the Supreme Court of the State of California and the decision and order of the Commission be affirmed.

Dated: San Francisco, California, November 9, 1951.

Respectfully submitted,

EVERETT C. MCKEAGE,
Chief Counsel,
WILSON E. CLINE,
Associate Counsel,
Attorneys for Appellee and Respondent
Public Utilities Commission
of the State of California.

FILED
DEC 7 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 464

UNITED AIR LINES, INC.,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

OSCAR A. TRIPPET,
458 South Spring Street,
Los Angeles 13, California,
Attorney for Appellant.

PAUL M. GODEHN,
JOHN T. LORCH,
EDMUND A. STEPHAN,
Of Counsel.

THE SUNTHORP-WARREN PRINTING COMPANY, 730 WEST JACKSON, CHICAGO

SUBJECT INDEX.

PAGE

I. This Appeal Presents Several Substantial Federal Questions 2

A. The Order of the Commission, Which Regulates Fares Charged Both Interstate and Intrastate Passengers by United, Is Beyond the Commission's Jurisdiction and Is in Direct Conflict With Federal Legislation..... 2

B. The Order of the Commission, as Applied to United, Places Such a Direct Burden on Interstate Commerce as to Constitute a Violation of the Interstate Commerce Clause of the Constitution of the United States... 9

C. The Commission's Order Assumes Jurisdiction Over a Field of Economic Regulation of Air Carriers Engaged in Both Interstate and Intrastate Commerce Which Has Been Pre-empted by Congress Through the Civil Aeronautics Act of 1938..... 12

II. Compliance by United With the Reparation Order of the Commission Would Violate the Provisions of Section 403(b) of the Civil Aeronautics Act of 1938 (49 U. S. C. 483(b)) and Would Deprive United of Property Without Due Process of Law 15

III. The Availability of a Petition for Rehearing of the California Supreme Court's Order Below Does Not Affect That Order's Finality 17

IV. Conclusion 18

Table of Authorities Cited.

Cases.

American Airlines, Inc., et al. v. Civil Aeronautics Board, ... F. 2d ....., 3 Avi. 17,702 (C. A. D. C., 1951) 13

B. & O. S. W. R. R. Co. v. Settle, 260 U. S. 166 (1922) 7, 16

Boston and M. R. R. v. Cate, 254 Mass. 248, 150 N. E. 210 (1926)..... 8

Bush v. Bremner, 36 F. 2d 189 (C. C. A. 8, 1929)..... 8

Chicago & Southern Air Lines v. Waterman S. S. Corporation, 333 U. S. 103 (1948).....9, 12

Civil Aeronautics Board v. Canadian Colonial Airways, 41 F. Supp. 1006 (S. D. N. Y., 1940)..... 8

East Ohio Gas Co. v. Federal Power Commission, 173 F. 2d 429 (C. A. D. C., 1948), reversed on other grounds, 338 U. S. 464 (1950)..... 4

Illinois Cent. R. Co. v. Holman, 106 Miss. 449, 64 So. 7 (1914) 8

Market St. Ry. Co. v. Railroad Commission, 324 U. S. 548 (1945)..... 17

Minnesota Rate Cases, 230 U. S. 352 (1913).....5, 10

Missouri, K. & T. Ry. Co. v. Ashinger, 63 Okla. 120, 162 Pac. 814 (1916)..... 8

Missouri-Kansas-Texas R. Co. v. Northern Oklahoma Rys., 25 F. 2d 689 (C. C. A. 8, 1928), cert. den. 278 U. S. 610 (1928)..... 16

Nast v. San Antonio, U. & G. Ry. Co., 261 S. W. 1011 (Tex. Com. App. 1924)..... 8

Northwest Airlines v. Minnesota, 322 U. S. 292 (1944) 12

Sprout v. City of South Bend, 277 U. S. 163 (1928).... 6

The Daniel Ball, 10 Wall. (77 U. S.) 557 (1870)..... 6
United States v. Yellow Cab Co., 332 U. S. 218 (1947).. 6
Wabash, etc., Railway Co. v. Illinois, 118 U. S. 557 (1886) 5, 10
Western Oil Refining Co. v. Lipscomb, 244 U. S. 346 (1917) 6

Statutes.

California Constitution:
Article XII, Sections 20 and 22..... 3
Civil Aeronautics Act (52 Stat. 977, 49 U. S. Code 401, et seq.)..... 3
Section 1(2), 49 U. S. C. 401(2)..... 5
Section 1(10), 49 U. S. C. 401(10).....5, 16
Section 1(21), 49 U. S. C. 483.....5, 16
Section 403, 49 U. S. C. 483.....5, 15
Section 406(b), 49 U. S. C. 486(b)..... 11
Section 1002(e), 49 U. S. C. 642(e)..... 14
Constitution of the United States:
Article I, Section 8..... 3, 9
14th Amendment, Section 1.....3, 15

Other Authorities.

1941 Annual Report, Civil Aeronautics Board, pp. 35-36 8
73 Corpus Juris Secundum, Public Administrative Bodies and Procedure, § 116..... 4
State Regulation of Economic Phases of Air Transportation—Views of the C. A. B. 14 Journal of Air Law and Commerce 356 (1947)..... 10